

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

CONVOLVE, INC.

Plaintiff,

V.

DELL INC.,  
WESTERN DIGITAL CORPORATION,  
HITACHI GLOBAL STORAGE  
TECHNOLOGIES, INC., and  
HITACHI LTD.,

Defendants.

[illegible]

Civil Action No. 2:08-cv-244

**DEFENDANT WESTERN DIGITAL CORPORATION'S SURREPLY TO  
PLAINTIFF CONVOLVE'S REPLY ON ITS MOTION TO STRIKE PORTIONS OF  
DR. A. BRUCE BUCKMAN'S EXPERT REPORT  
ON INVALIDITY OF THE '473 PATENT**

Early in this proceeding, through the production of documents and through the defendants' invalidity contentions, Convolve was made aware of Western Digital's prior art 1994 AL2200 disk drive. D.I. 319 at 2–3 & Exhibits 1–8. Indeed, Convolve consented to the amendment of the defendants' invalidity contentions that referenced Western Digital's AL2200. D.I. 116. Documents pertaining to the drive were addressed in Dr. Buckman's Expert Report. *See* D.I. 341-3 at 292–95.

In its Reply, Convolve argues, referring to both the WDAL2200 and the Seagate Hawk drives: "It is also evident from the experts' reports that Dr. Buckman and Dr. Sidman had sufficient access to test the hard drives, and have used these tests in conjunction with their opinions on invalidity." Convolve Reply at 1–2. Addressing just the Western Digital AL2200 because the Hawk drives are addressed by our co-defendants, this contention is incorrect. The experts did not test the AL2200 and did not use these tests in conjunction

with their opinions on invalidity. Specifically, Dr. Buckman has not had access to the AL2200 unit nor has he tested it. (Only one AL2200 unit was found and it is broken. It was disclosed to Convoke within 24 hours of being found.) Dr. Buckman's report relies on the AL2200 documents, which Convoke agrees were produced in a timely manner.

Convoke sued Seagate and Compaq (a Western Digital customer) on the '473 patent in 2001. Convoke waited seven years, until 2008, to sue Western Digital. Western Digital has not been able to locate a working unit of its early two-decade old 1994 AL2200 product despite a diligent search. Convoke's more than six-year delay in filing suit has prejudiced Western Digital, as it is more likely that Western Digital would have been able to find a working AL2200 unit in 2001 (seven years after it was sold) than in 2008 (14 years after it was sold). In any event, no working units have been found. No expert is relying on any testing that they did on the AL2200. Convoke's motion is based on an incorrect premise.

In footnote 3, Convoke asks, as alternative relief, to inspect the AL2200. Western Digital agreed to that in April. No expert in this case has inspected the broken 17 year-old AL2200 unit and thus no expert will offer the results of an AL2200 inspection at trial. Nevertheless, Convoke's expert has been free to inspect the unit since April and that offer remains open.

Convoke's motion should be denied.

Dated: June 16, 2011

Respectfully submitted,

/s/ Bruce A. Wessel

Bruce A. Wessel (admitted *pro hac vice*)  
California State Bar No. 116734  
Richard M. Birnholz (admitted *pro hac vice*)  
California State Bar No. 151543  
Garland A. Kelley (admitted *pro hac vice*)  
California State Bar No. 225450  
Thomas C. Werner (admitted *pro hac vice*)  
California State Bar No. 223792

Irell & Manella L.L.P.  
1800 Avenue of the Stars, Suite 900  
Los Angeles, California 90067  
T: (310) 203-7045, F: (310) 203-7199  
Email: bwessel@irell.com  
Email: rbirnholz@irell.com  
Email: gkelley@irell.com  
Email: twerner@irell.com

Reynaldo C. Barcelo (admitted *pro hac vice*)  
California State Bar No. 199741  
Barcelo, Harrison & Walker, LLP  
2901 West Coast Highway, Suite 200  
Newport Beach, California 92663  
T: (949) 340-9736, F: (949) 258-5752  
Email: rey@bhiplaw.com

Harold Kip Glasscock, Jr.  
Texas State Bar No. 08011000  
Kip Glasscock Attorney at Law  
550 Fannin, Suite 1350  
Beaumont, Texas 77701  
T: (409) 833-8822, F: (409) 838-4666  
Email: kipglasscock@hotmail.com

Melissa Richards Smith  
Texas State Bar No. 24001351  
GILLAM & SMITH, L.L.P.  
303 South Washington Avenue  
Marshall, Texas 75670  
T: (903) 934-8450, F: (903) 934-9257  
Email: Melissa@gillamsmithlaw.com

*ATTORNEYS FOR DEFENDANT WESTERN  
DIGITAL CORPORATION*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served on all counsel of record by email on June 16, 2011.

Dated: June 16, 2011

/s/ Bruce A. Wessel  
Bruce A. Wessel